

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

Southern Division

\_\_\_\_\_  
**JEFF SCHMIDT,** )  
                        )  
                        )  
**Plaintiff,**        )  
                        )  
                        )  
                        )  
                        )  
v.                     ) Civil Action No.: 8:04-cv-3774 (AW)  
                        )  
                        )  
                        )  
**AMERICAN INSTITUTE OF PHYSICS,** )  
                        )  
                        )  
**Defendant.**        )  
                        )  
\_\_\_\_\_

**DEFENDANT'S ANSWER TO PLAINTIFF'S FIRST AMENDED AND  
CONSOLIDATED COMPLAINT**

Defendant, by and through its undersigned counsel, hereby responds to the allegations in Plaintiff's First Amended and Consolidated Complaint ("Complaint") as follows:

**AS TO: "I. NATURE OF ACTION"**

1. Defendant denies the allegations contained in paragraph "1" of the Complaint, except denies knowledge or information sufficient to form a belief as to Schmidt's citizenship and race and admits only that Plaintiff purports to bring this action for breach of contract, detrimental reliance, breach of implied covenant of good faith and fair dealing, and violation of 42 U.S.C. §§1981 and 1983 and to seek damages, and that he is a former employee of AIP.

2. Defendant denies the allegations contained in paragraph "2" of the Complaint, except admits that Plaintiff purports to bring this action under Title VII of the Civil Rights Act of 1964 and to seek damages.

**AS TO: "II. JURISDICTION AND VENUE"**

3. Defendant denies the allegations contained in paragraph "3" of the Complaint, except admits that Plaintiff purports to invoke federal jurisdiction.

4. Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "4" of the Complaint, except admits that Plaintiff has attached to the Complaint a purported copy of a Notice of Suit Rights from the U.S. Equal Employment Opportunity Commission.

5. Defendant denies the allegations contained in paragraph "5" of the Complaint, except admits that the United States District Court for the District of Columbia transferred Plaintiff's common law and 42 U.S.C. §1983 claims to the United States District Court for the District of Maryland, and that the parties consented to the transfer of Plaintiff's claims under 42 U.S.C. §1981.

**AS TO "III. PARTIES"**

6. Defendant denies the allegations contained in paragraph "6" of the Complaint, except denies knowledge or information sufficient to form a belief as to Plaintiff's citizenship and race. Defendant admits only that Plaintiff commenced employment with AIP at its New York, NY location in or about March 1981, he moved to Washington, D.C. in October 1993 and that he worked at AIP's College Park, Maryland main offices from October 1993 to May 31, 2000.

7. Defendant admits the allegations contained in paragraph 7.

**AS TO: "IV. AIP MANAGEMENT"**

8. Defendant denies the allegations contained in paragraph "8" of the Complaint, except admits that Dr. Marc H. Brodsky is AIP's Executive Director and CEO and that Dr. Brodsky is Dr. James H. Stith's direct supervisor

9. Defendant denies the allegations contained in paragraph "9" of the Complaint, except admits that Theresa Braun is AIP's Vice President Human Resources, and that she reports directly to Dr. Brodsky.

10. Defendant denies the allegations contained in paragraph "10" of the Complaint, except admits that Dr. Stith is AIP's Vice President, Physics Resources and that he reports directly to Dr. Brodsky.

11. Defendant denies the allegations contained in paragraph "11" of the Complaint, except admits that Randolph A. Nanna is Publisher of *Physics Today* and Mr. Nanna was hired in or around November 15, 1999 to replace Charles Harris, whom AIP discharged on or about March 2, 1999. Defendant admits that Mr. Nanna reports to Dr. Stith.

12. Defendant denies the allegations contained in paragraph "12" of the Complaint, except admits that Stephen G. Benka was Plaintiff's direct Supervisor from in or around September 1994 until Plaintiff's dismissal, that Dr. Benka is the Editor of *Physics Today* and that Dr. Benka currently reports to Mr. Nanna and formerly reported to Mr. Harris.

**AS TO "V. ALLEGATIONS"**

13. Defendant denies the allegations contained in paragraph "13" of the Complaint, except admits that Plaintiff was employed as an editor by AIP from March 17, 1981 to May 31, 2000.

14. Defendant denies the allegations contained in paragraph "14" of the Complaint.

15. Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "15" of the Complaint.

16. Defendant denies the allegations contained in paragraph "16" of the Complaint.

17. Defendant denies the allegations contained in paragraph "17" of the Complaint, except denies knowledge or information sufficient to form a belief with regard to Plaintiff's "efforts".

18. Defendant denies the allegations contained in paragraph "18" of the Complaint, except denies knowledge or information sufficient to form a belief as to any purported actions by Dr. Schmidt and Ms. Kumagai as to the *Physics Today* staff.

19. Defendant denies the allegations contained in paragraph "19" of the Complaint, except denies knowledge or information sufficient to form a belief as to whether Charles Harris may have "communicated" to Plaintiff and other staff members.

20. Defendant denies the allegations contained in paragraph "20" of the Complaint.

21. Defendant denies the allegations contained in paragraph "21" of the Complaint.

22. Defendant denies the allegations contained in paragraph "22" of the Complaint.

23. Defendant denies the allegations contained in paragraph "23" of the Complaint, except denies knowledge or information sufficient to form a belief as to what Mr. Harris may have "indicated" to Plaintiff a "few days" after the 1997 staff retreat.

24. Defendant denies the allegations contained in paragraph "24" of the Complaint, except admits that on or about October 1, 1997, a document was given to Plaintiff by Messrs. Harris and Benka.

25. Defendant denies the allegations contained in paragraph "25" of the Complaint, except denies knowledge or information sufficient to form a belief as to whether Plaintiff was "frustrated" or whether Plaintiff met with the *Physics Today* advisory committee.

26. Defendant denies the allegations contained in paragraph "26" of the Complaint.

27. Defendant denies the allegations contained in paragraph "27" of the Complaint, except admits that on or about November 5, 1997 Plaintiff gave to Dr. Brodsky a memorandum and that Dr. Brodsky "said he would investigate and get back to Dr. Schmidt".

28. Defendant denies the allegations contained in paragraph "28" of the Complaint.

29. Defendant denies the allegations contained in paragraph "29" of the Complaint.

30. Defendant denies the allegations contained in paragraph "30" of the Complaint, except admits that Dr. Brodsky contacted Plaintiff to reassure him that Dr. Brodsky's investigation into Plaintiff's alleged concerns was ongoing.

31. Defendant denies the allegations contained in paragraph "31" of the Complaint, except denies knowledge or information sufficient to form a belief as to what Mr. Harris may have said to Plaintiff.

32. Defendant denies the allegations contained in paragraph "32" of the Complaint.

33. Defendant denies the allegations contained in paragraph "33" of the Complaint.

34. Defendant admits that Dr. Brodsky and Dr. Schmidt met on or about March 20, 1998, and denies all of the remaining allegations contained in paragraph "34" of the Complaint.

35. Defendant denies the allegations contained in paragraph "35" of the Complaint.

36. Defendant denies the allegations contained in paragraph "36" of the Complaint, except admits that Plaintiff sought review of his 1998 performance review by Ms. Braun and Dr. Stith and avers that the document Plaintiff submitted speaks for itself.

37. Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "37" of the Complaint.

38. Defendant denies the allegations contained in paragraph "38" of the Complaint.

39. Defendant denies the allegations contained in paragraph "39" of the Complaint.

40. Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "40" of the Complaint, except admits that AIP granted Plaintiff a leave from mid-December to mid-June 1999.

41. Defendant denies the allegations contained in paragraph "41" of the Complaint, except denies knowledge or information sufficient to form a belief as to whether *Physics Today* staff members discuss performance reviews with co-workers.

42. Defendant admits the allegations contained in paragraph “42” of the Complaint.

43. Defendant denies the allegations contained in paragraph “43” of the Complaint.

44. Defendant denies the allegations contained in paragraph “44” of the Complaint, except admits that Plaintiff received a performance review.

45. Defendant denies the allegations contained in paragraph “45” of the Complaint.

46. Defendant admits the allegations contained in paragraph “46” of the Complaint.

47. Defendant denies the allegations contained in paragraph “47” of the Complaint.

48. Defendant denies the allegations contained in paragraph “48” of the Complaint.

49. Defendant denies the allegations contained in paragraph “49” of the Complaint.

50. Defendant admits, upon information and belief, the allegations contained in paragraph “50” of the Complaint.

51. Defendant denies the allegations contained in paragraph “51” of the Complaint.

52. Defendant denies the allegations contained in paragraph “52” of the Complaint.

53. Defendant denies the allegations contained in paragraph "53" of the Complaint, except admits that Plaintiff's employment was terminated on May 31, 2000 and admits that Plaintiff wrote that he stole time from AIP.

54. Defendant denies the allegations contained in paragraph "54" of the Complaint.

55. Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "55" of the Complaint.

56. Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "56" of the Complaint.

**AS TO "COUNT I**

**(Breach of Contract)"**

57. Defendant repeats and realleges, by this reference, each and every admission, denial and other response as set forth above in reply to the allegations contained in paragraph "1" through "56", above, and denies each and every allegation not admitted unequivocally hereinabove.

58. Defendant denies the allegations contained in paragraph "58" of the Complaint.

59. Defendant denies the allegations contained in paragraph "59" of the Complaint, except admits that AIP employees are not penalized for expressing concerns about the workplace.

60. Defendant denies the allegations contained in paragraph "60" of the Complaint.

61. Defendant denies the allegations contained in paragraph "61" of the Complaint.

62. Defendant denies the allegations contained in paragraph "62" of the Complaint.

63. Defendant denies the allegations contained in paragraph "63" of the Complaint.

64. Defendant denies the allegations contained in paragraph "64" of the Complaint.

**AS TO "COUNT II"**

**(Detimental Reliance)"**

65. Defendant repeats and realleges, by this reference, each and every admission, denial and other response as set forth above in reply to the allegations contained in paragraph "1" through "64", above, and denies each and every allegation not admitted unequivocally hereinabove.

66. Defendant denies the allegations contained in paragraph "66" of the Complaint, except admits that AIP employees may speak freely about workplace concerns without jeopardizing their employment.

67. Defendant denies the allegations contained in paragraph "67" of the Complaint.

68. Defendant denies the allegations contained in paragraph "68" of the Complaint.

69. Defendant denies the allegations contained in paragraph "69" of the Complaint.

**AS TO “COUNT III”**

**(Breach of Implied Covenant of Good Faith and Fair Dealing)”**

70. Defendant repeats and realleges, by this reference, each and every admission, denial and other response as set forth above in reply to the allegations contained in paragraph “1” through “69”, above, and denies each and every allegation not admitted unequivocally hereinabove.

71. Defendant denies the allegations contained in paragraph “71” of the Complaint.

72. Defendant denies the allegations contained in paragraph “72” of the Complaint.

73. Defendant denies the allegations contained in paragraph “73” of the Complaint.

**AS TO “COUNT IV”**

**(42 U.S.C. §1981)”**

74. Defendant repeats and realleges, by this reference, each and every admission, denial and other response as set forth above in reply to the allegations contained in paragraph “1” through “73”, above, and denies each and every allegation not admitted unequivocally hereinabove.

75. Defendant denies the allegations contained in paragraph “75” of the Complaint.

76. Defendant denies the allegations contained in paragraph “76” of the Complaint.

77. Defendant denies the allegations contained in paragraph “77” of the Complaint.

**AS TO “COUNT V**  
**(42 U.S.C. §1983)”**

78. Defendant repeats and realleges, by this reference, each and every admission, denial and other response as set forth above in reply to the allegations contained in paragraph “1” through “77”, above, and denies each and every allegation not admitted unequivocally hereinabove.

79. Defendant denies the allegations contained in paragraph “79” of the Complaint.

80. Defendant denies the allegations contained in paragraph “80” of the Complaint.

81. Defendant denies the allegations contained in paragraph “81” of the Complaint.

82. Defendant denies the allegations contained in paragraph “82” of the Complaint.

83. Defendant denies the allegations contained in paragraph “83” of the Complaint.

- a. Defendant denies the allegations contained in paragraph “83” (a) of the Complaint.
  - b. Defendant denies the allegations contained in paragraph “83” (b) of the Complaint.
  - c. Defendant denies the allegations contained in paragraph “83” (c) of the Complaint.
  - d. Defendant denies the allegations contained in paragraph “83” (d) of the Complaint.
84. Defendant denies the allegations contained in paragraph “84” of the Complaint.
85. Defendant denies the allegations contained in paragraph “85” of the Complaint.

**AS TO “COUNT VI**

**(42 U.S.C. §2000e et seq.)”**

86. Defendant repeats and realleges, by this reference, each and every admission, denial and other response as set forth above in reply to the allegations contained in paragraph “1” through “85”, above, and denies each and every allegation not admitted unequivocally hereinabove.

87. Defendant denies the allegations contained in paragraph “87” of the Complaint.

88. Defendant denies the allegations contained in paragraph “88” of the Complaint.

**AS TO: "VI. PRAYER FOR RELIEF"**

89. Defendant denies the allegations contained in the "Prayer for Relief" clause and further denies that Plaintiff has pleaded a claim upon which relief could be granted and denies that he is entitled to any relief whatsoever.

**AS TO: "VII. DEMAND FOR A JURY TRIAL"**

90. Defendant admits that Plaintiff purports to demand a trial by jury. Defendant explicitly denies that Plaintiff has stated a claim upon which relief can be granted and that he is entitled to a jury trial or to any relief whatsoever.

Without assuming the burden of proof as to any of the following defenses where the law does not impose such a burden on Defendant, Defendant asserts the following affirmative defenses:

**FIRST AFFIRMATIVE DEFENSE**

91. The Complaint should be dismissed, in whole or in part, because it fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

92. The Complaint should be dismissed because all actions undertaken by Defendant with respect to Plaintiff were undertaken for legitimate, non-discriminatory and non-retaliatory reasons.

**THIRD AFFIRMATIVE DEFENSE**

93. Plaintiff's claims should be dismissed to the extent that Plaintiff did not satisfy all jurisdictional prerequisites or conditions precedent to suit.

**FOURTH AFFIRMATIVE DEFENSE**

94. To the extent that Plaintiff failed to make good faith and diligent efforts to mitigate his purported damages and injuries, any relief awarded to Plaintiff should be denied or diminished, in whole or in part.

**FIFTH AFFIRMATIVE DEFENSE**

95. Plaintiff's claims should be dismissed to the extent that they are barred by applicable statutes of limitation and/or the doctrine of laches.

**SIXTH AFFIRMATIVE DEFENSE**

96. In the event that it is concluded that a prohibited factor motivated any act alleged by Plaintiff against Defendant, the same acts would have been undertaken even absent said alleged discriminatory motive.

**SEVENTH AFFIRMATIVE DEFENSE**

97. To the extent that Plaintiff's claims are compensable, in whole or in part, under any State's Workers' Compensation Law, those claims are barred by the exclusive remedy provision contained in said Workers' Compensation Law.

**EIGHTH AFFIRMATIVE DEFENSE**

98. To the extent that Plaintiff engaged in acts of misconduct prior to or during employment which, if known by Defendant, would have resulted in termination of Plaintiff's employment, any relief awarded to Plaintiff should be reduced, in whole or in part.

**NINTH AFFIRMATIVE DEFENSE**

99. The Complaint is barred, in whole or in part, because (a) Defendant exercised reasonable care to investigate promptly any alleged discriminatory, retaliatory or harassing behavior, and (b) Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by Defendant or to avoid harm otherwise.

**TENTH AFFIRMATIVE DEFENSE**

100. The Complaint should be dismissed because Defendant did not enter into an oral or written agreement containing terms alleged in the Complaint, and, because neither any alleged agreement nor any note or memorandum thereof was made in writing and subscribed to by Defendant, Plaintiff's claims are barred by the Statute of Frauds.

**ELEVENTH AFFIRMATIVE DEFENSE**

101. Defendant has fully performed all obligations under any agreement, written or oral, with Plaintiff.

**TWELFTH AFFIRMATIVE DEFENSE**

102. To the extent that Plaintiff's Complaint is based on an alleged breach of contract, Plaintiff cannot recover legal fees, punitive damages or compensatory damages with regard thereto.

**THIRTEENTH AFFIRMATIVE DEFENSE**

103. Plaintiff's causes of action alleging violation of 42 U.S.C. §1983 or "due process" should be dismissed for failure to state a claim upon which relief can be granted because Defendant is not an entity that acted under color of state law with respect to Plaintiff.

**FOURTEENTH AFFIRMATIVE DEFENSE**

104. Plaintiff was, at all times, an at-will employee, having no contractual or quasi-contractual entitlement and, as such, all contract and other claims should be dismissed.

**FIFTEENTH AFFIRMATIVE DEFENSE**

105. At all times relevant hereto, Defendant acted in good faith toward Plaintiff and did not violate any rights which may be secured to Plaintiff under federal, state or local laws, rules, regulations or guidelines.

**SIXTEENTH AFFIRMATIVE DEFENSE**

106. The Complaint must be dismissed because of Plaintiff's intentional or other misconduct or the doctrine of laches.

Dated: February 25, 2004

**JACKSON LEWIS LLP**

/s/ Teresa Burke Wright

Wendy J. Mellk<sup>1</sup>  
Teresa Burke Wright  
(MD Federal Bar No. 08602)  
8614 Westwood Center Drive  
Suite 950  
Vienna, Virginia 22182  
Telephone: 703-821-2189  
Facsimile: 703-821-2267

---

<sup>1</sup> Application for pro hac vice admission granted on November 19, 2004 in case number 8:04-cv-03270-AW, which was consolidated with this case on January 11, 2005.